

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF ILLINOIS

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| IN RE: |) | |
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| HERBERT C. GRIFFIETH, |) | No. 03-82755 |
| |) | |
| Debtor. |) | |
| _____ |) | |
| |) | |
| RUTH M. TABOR and LYLE W. TABOR, |) | |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | Adv. No. 03-8170 |
| |) | |
| HERBERT C. GRIFFIETH, |) | |
| |) | |
| Defendant. |) | |

OPINION

This adversary proceeding filed by the Plaintiffs, Ruth M. Tabor and Lyle W. Tabor (PLAINTIFFS), against the Debtor, Herbert C. Griffieth (DEBTOR), seeking a determination that a debt evidenced by a state court judgment obtained for violations of the Illinois Residential Real Property Disclosure Act is nondischargeable under Section 523(a)(2)(A) for fraud, is before the Court on the Motion for Summary Judgment filed by the PLAINTIFFS.

In September of 1999, the DEBTOR sold residential property to the PLAINTIFFS. Prior to the closing of the sale, as required by Illinois law, the DEBTOR furnished a Residential Real Property Disclosure Report to the PLAINTIFFS. The DEBTOR reported that he was not aware of material defects in the well or well equipment and that he was not aware of boundary or lot line disputes. After the PLAINTIFFS moved into the property, they discovered that the well did not produce sufficient water for the house and were

confronted with a boundary dispute with two of their new neighbors. After repairing the well and hiring a surveyor, the PLAINTIFFS sued the DEBTOR in state court for violation of the Illinois Residential Real Property Disclosure Act (ACT), 765 ILCS 77/1 *et seq.*, recovering a judgment in the amount of \$7,146.63, plus costs of \$104.50 and attorney fees of \$2,712.50.¹ The judgment order entered September 30, 2002, awarded a judgment to the PLAINTIFFS on Count I, only, and states that the court found in favor of the DEBTOR on Count II. Based upon the papers filed by the parties, this Court deduces that Count I stated a claim for the well problem and Count II stated a claim for the boundary line problem.

The DEBTOR filed a Chapter 7 petition on June 5, 2003. The PLAINTIFFS initiated this adversary proceeding under Section 523(a)(2)(A). Claiming that the pending adversary proceeding raises the identical issues determined in the state court action, the PLAINTIFFS moved for summary judgment under the doctrine of collateral estoppel. The DEBTOR maintains that the state court judgment has no preclusive effect because the elements necessary to prevail in that action are not the same as those required to establish nondischargeability under Section 523(a)(2)(A). At the pretrial hearing, the Court indicated to the PLAINTIFFS that they should submit a copy of their complaint filed in the state court action along with any other pleadings filed.

SUMMARY JUDGMENT

A motion for summary judgment may be properly granted when the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if

¹It appears that the PLAINTIFFS’ entire cause of action in state court was based on a violation of the ACT. The only document attached to the adversary complaint filed in this Court is the judgment entered by the state court.

any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Summary judgment should only be granted where it is clear that there is no dispute about the facts or inferences to be drawn therefrom. *Central Nat. Life Ins. Co. v. Fidelity and Deposit Co. of Maryland*, 626 F.2d 537 (7th Cir. 1980). The court must view the evidence in the light most favorable to the nonmoving party. *In re Chambers*, 348 F.3d 650 (7th Cir. 2003). Summary judgment is appropriate under the doctrine of collateral estoppel when all of the material issues of fact in a pending proceeding have been actually and necessarily resolved in a prior proceeding.

COLLATERAL ESTOPPEL

The doctrine of collateral estoppel applies in dischargeability proceedings. *Grogan v. Garner*, 498 U.S. 279, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991). The Seventh Circuit Court of Appeals has enumerated four requirements which must be met in order for the doctrine to apply: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the determination of the issue must have been essential to the final judgment; and (4) the party against whom estoppel is invoked must be fully represented in the prior action.² *Klingman v. Levinson*, 831 F.2d 1292 (7th Cir. 1987). The party seeking to assert the doctrine bears the burden of proving all of the requisites for its application. *In re Berr*, 172 B.R. 299 (9th Cir.BAP 1994). Collateral estoppel, or “issue preclusion,” may apply to bar relitigation of specific issues of fact

²The same elements are applicable under Illinois law. See, *Wozniak v. DuPage County*, 845 F.2d 677 (7th Cir. 1988).

necessarily decided in prior litigation, even if the prior claim is not identical to the pending claim. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979); *In re Northwest Pipe & Casing Co.*, 67 B.R. 639 (Bankr.D.Or. 1986). Ordinarily, the reviewing court must examine the record in the prior proceeding to determine the controlling facts and identify the exact issues litigated in the prior action.

ANALYSIS

The only contested element of the doctrine of collateral estoppel here is whether the issues in this action are identical to the ones decided in the state court action. There is no question but that they are not. The purpose of the ACT is to provide prospective buyers with information about material defects known to the seller concerning the property. *Coughlin v. Gustafson*, 332 Ill.App.3d 406, 413, 772 N.E.2d 864, 869, 265 Ill.Dec. 493, 498 (Ill.App. 1 Dist. 2002). It is “not intended to limit or modify any obligation to disclose created by any other statute or that may exist in common law in order to avoid fraud, misrepresentation, or deceit in the transaction.” 765 ILCS 77/45. A failure to disclose a material defect as required by the ACT may also serve as the sole basis for a fraud claim, provided the other elements of proof are met. *Rolando v. Pence*, 331 Ill.App.3d 40, 769 N.E.2d 1108 (Ill.App. 2 Dist. 2002). Section 25 of the ACT requires the seller to disclose “material defects of which the seller has actual knowledge.” 765 ILCS 77/25(b).³ Section

³The seller’s liability is not absolute, as the first subsection of Section 25 makes clear:

(a) The seller is not liable for any error, inaccuracy, or omission of any information delivered pursuant to this Act if (i) the seller had no knowledge of the error, inaccuracy, or omission, (ii) the error, inaccuracy, or omission was based on a reasonable belief that a material defect or other matter not disclosed had been corrected, or (iii) the error, inaccuracy, or omission was based on information provided by a public agency or by a licensed engineer, land surveyor, structural pest control operator, or by a contractor about matters within the scope of the contractor’s occupation and the seller had no knowledge of the error, inaccuracy, or omission. 765 ILCS 77/25(a).

Nor is the seller required to make a specific investigation before he completes the disclosure statement. 765 ILCS 77/25(c).

55 of the ACT provides that a seller who discloses information on the report known to be false is liable to the buyer for actual damages and court costs. 765 ILCS 77/55. The buyer's knowledge of undisclosed material defects does not absolve the seller from liability, though it may affect the damages recoverable. *Woods v. Pence*, 303 Ill.App.3d 573, 708 N.E. 2d 563, 236 Ill.Dec. 977 (Ill.App. 3 Dist. 1999). While the disclosure report is not a substitute for inspections or warranties, a purchaser is entitled to rely on the truthfulness, accuracy and completeness of the statements contained therein. *Hogan v. Adams*, 333 Ill.App.3d 141, 755 N.E.2d 217, 266 Ill.Dec. 655 (Ill.App. 4 Dist. 2002).

In contrast, in order to establish a claim under Section 523(a)(2)(A), the creditor must prove: (1) the debtor made a false representation (2) with the intent to deceive the creditor; (3) the creditor relied on the representation (4) the creditor's reliance was justifiable; and (5) the false representation resulted in damage to the creditor. *Field v. Mans*, 516 U.S. 59, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995). In order to prevail under the ACT, a home buyer need not establish that the seller made the false disclosure with the intent to deceive or that the home buyer relied on the false disclosure or that such reliance was justifiable, but those elements must be established under Section 523(a)(2)(A).

The PLAINTIFFS have submitted only a judgment entered by the state court on September 30, 2002, a judgment order entered on November 12, 2002, and their motion to reconsider that judgment, filed on December 10, 2002. The judgment recites that the court found in the PLAINTIFFS' favor on Count I of the complaint and found in the DEBTOR'S favor on Count II of the complaint. Despite this Court's recommendation to the PLAINTIFFS at the pretrial hearing that a copy of the complaint be submitted with the

motion for summary judgment, a copy of the complaint is not in the record. In their motion, however, the PLAINTIFFS concede that the state court determined liability under the ACT. Their allegation, made both in the adversary complaint and the pretrial statement, that the state court judgment was based upon a finding of actual fraud, is wholly unsupported. Contrary to the PLAINTIFFS' assertions, no inferences can be drawn by this Court concerning the DEBTOR'S intent to deceive from the state court's award of attorney fees or concerning the PLAINTIFFS' reliance on the false disclosure from the state court's denial of the DEBTOR'S motion to reconsider seeking a reduction in the amount of damages awarded to the PLAINTIFFS, based on their purported knowledge of the defects. Possibility and surmise do not provide a basis for application of the doctrine of collateral estoppel. Under the ACT, an award of attorney fees is discretionary.⁴ The PLAINTIFFS' contentions are nothing but conjecture.

Accordingly, the PLAINTIFFS' motion for summary judgment based upon the doctrine of collateral estoppel must be denied. The doctrine of collateral estoppel will apply, however, to bar relitigation of the first and fifth elements of the PLAINTIFFS' claim under Section 523(a)(2)(A), as set forth above. Therefore, the DEBTOR is bound by the state court's determination that his Disclosure Report representation that he was unaware of material defects in the well or well equipment was false, and by the determination that the PLAINTIFFS suffered damages as a result in the amount of the judgment.⁵

⁴ The ACT provides that the court "may award reasonable attorney fees incurred by the prevailing party." 765 ILCS 77/55.

⁵ Should this Court find in the PLAINTIFF'S favor after trial, it will address their contention that the attorney fees awarded by the state court are also nondischargeable.

The preclusive effect, if any, of the state court's finding in favor of the DEBTOR on the claim relating to the boundary line disclosure issue, cannot be determined at this juncture. Since the judgment does not recite the court's reasoning and does not contain any specific findings of fact, this Court cannot ascertain what issues were actually determined by the state court that provided the basis for its finding in favor of the DEBTOR on Count II. If the DEBTOR, in the future course of this adversary proceeding, claims that the state court's judgment on Count II has any preclusive effect, he will bear the burden of proving all of the applicable elements of the preclusion doctrine at that time.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: February 18, 2004.

THOMAS L. PERKINS
UNITED STATES BANKRUPTCY JUDGE

Copies to:

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U.S. Trustee, 401 Main Street, Suite 1100, Peoria, Illinois 61602

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| |) | |
| Defendant. |) | |

ORDER

For the reasons stated in an Opinion filed this day, IT IS HEREBY ORDERED that the PLAINTIFFS' Motion for Summary Judgment is DENIED.

Dated: February 18, 2004.

THOMAS L. PERKINS
UNITED STATES BANKRUPTCY JUDGE

Copies to:
Charles E. Covey
Dick B. Williams
U.S. Trustee